INDEX

CITATIONS

640194—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1057

FREDERICK C. MERGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 81–84) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1945 (R. 85). The petition for a writ of certiorari was filed on March 19, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether inculpatory statements, made by petitioner while he was under the influence of alcohol, were properly admitted in evidence, when the statements were made to police officials who questioned him for about twenty minutes during the two-hour period that elapsed between petitioner's arrest and the time he was taken before the United States Commissioner.

STATUTE INVOLVED

Section 1 of the Act of August 18, 1894, c. 301, 28 Stat. 416, as amended (18 U. S. C. 595), provides:

> It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before

him, and no mileage shall be allowed any officer violating the provisions hereof.[1]

STATEMENT

Petitioner was convicted in the United States District Court for the District of Columbia of the first degree murder of Charlotte Robinson, and was sentenced to death by electrocution (R. 4–5, 6–7, 8–9). On appeal, the judgment of the district court was affirmed (R. 85).

There was evidence from which the jury could have found the following facts: In April 1942, petitioner, a widower, employed Charlotte Robinson to care for his children (R. 24–28). He became friendly with her and expressed his intention of marrying her (R. 26, 28). In October 1943, Mrs. Robinson left petitioner's household to seek other employment (R. 28, 33.) Petitioner saw her occasionally thereafter and they quarreled about money matters (R. 24–25, 28, 33, 43).

[1] Petitioner refers to D. C. Code, Title 4, sec. 140, as controlling (Br. 19). But that provision applies only to arrests for offenses committed "in the presence of such member [of the police force], or within his view." That was not the situation here, and the Court of Appeals' ruling to the contrary in *Mitchell* v. *United States*, 138 F. 2d 426, reversed, 322 U. S. 65, is, of course, not binding on this Court. Cf. *District of Columbia* v. *Pace*, 320 U. S. 698; *Del Vecchio* v. *Bowers*, 296 U. S. 280. In any event, "whatever may be the minor variations of language, [these statutes simply] require that arresting officers shall with reasonable promptness bring arrested persons before a committing authority." *United States* v. *Mitchell*, 322 U. S. 65, 66.

On October 25, 1943, petitioner made an appointment to meet Mrs. Robinson. Although he did not normally carry a gun, he took one with him at that time. After petitioner met Mrs. Robinson, he drove with her to the vicinity of Fifth and A Streets, N. E., in Washington, D. C. They had an argument about money and petitioner shot her four times. He then attempted to throw her body down a manhole but was interrupted by a passerby; he drove away, leaving the body resting near a tree box. (R. 12–13, 14, 25, 26, 28–29.) The police were notified and they took Mrs. Robinson, who was still alive, to a hospital. She died shortly thereafter. (R. 13, 14–15.)

The two sergeants of the Metropolitan Police who arrested petitioner testified, in substance, as follows: About 2:00 p. m., on October 26, 1943, the day after the killing of Mrs. Robinson, they called at petitioner's home. Outside the house they saw an automobile with a bullet hole in the ventilator window, a lady's coat on the front seat, and blood stains on the cover of the front seat. The officers identified themselves to petitioner's father, who invited them in. Petitioner, who was in another room, asked if either of them was Inspector Barrett, and received a negative reply. Petitioner asked the officers to go to the sun-parlor of the house and then asked them what he could do for them. They inquired whether he knew Charlotte Robinson, and he replied that he did, that he was in love with her, and that "she was

a rat." One of the sergeants left the room. When he returned, he informed petitioner that he was under arrest and asked him where the gun was. Petitioner stated that the gun was in the car, and the sergeant again left the room. Petitioner stated that "I'm going to kill one of you sons of bitches or you are going to kill me before you leave here," but the police sergeant thought that petitioner was "just talking". Petitioner then pulled a gun from his hip pocket and the sergeant remaining in the room jumped on his back. The rug slipped and petitioner fell to the floor, where he and the sergeant tussled for the gun. The other sergeant came back and took the gun away from petitioner. The officers then took him to their car and started for No. 8 police precinct. En route they had a radio call directing them to take petitioner to No. 10 precinct. (R. 15–16, 18.)

Before their arrival at No. 10, petitioner became calm. In the course of the trip, petitioner stated to one of the officers, "You want to know all about who killed that girl, don't you," that "I can tell you, don't you think I can't. If you get me some whiskey, I will tell you about it; don't you think I can't." To this the officer replied, "Well, we'll talk about that later." (R. 19.) Upon their arrival at No. 10 precinct, the officers left petitioner with Inspector Barrett and Lieutenant Flaherty (R. 19).

At the time of his arrest petitioner was noticeably under the influence of alcohol, but there was no thickness of his tongue. He could be understood and he apparently understood what was said to him. (R. 16, 18–20.) During the time the officers were at his home petitioner drank a small glass of wine (R. 16, 18). On the way to the precinct, one of the officers talked to petitioner and petitioner gave responsive answers (R. 19). Petitioner staggered in going up the steps of No. 10 precinct, but when one of the sergeants attempted to straighten him, he ran up the steps, stating that he needed no assistance (R. 16, 19).

Following this testimony of the arresting officers, the Government called Inspector Barrett and Lieutenant Flaherty to testify as to statements made by petitioner to them after his arrest. A preliminary hearing was held out of the presence of the jury on the question of the admissibility of such testimony, and the trial judge ruled that it was admissible (R. 20–24). The testimony as to the statements and the circumstances under which they were made was then given before the jury (R. 24–31). The following facts were adduced: Inspector Barrett ordered that petitioner, whom he had previously known, be brought to No. 10 precinct for the purpose of talking with him (R. 21). Barrett talked with petitioner about ten minutes at approximately 3:00 p. m. Subsequently, Lieuteuant Flaherty came in and the three men talked for approximately eight minutes

more. (R. 20–21.) In the course of these interviews petitioner admitted that he had shot Mrs. Robinson and he related in detail the circumstances of the crime (R. 24–26, 27–29).[2] Petitioner was under the influence of liquor at the time of the interviews. He told the inspector he had been drinking since Friday, October 22, three days prior to the killing. He talked plainly at times and less so at other times. When he spoke of his children, he cried, but he was "nasty" when speaking of Mrs. Robinson. He understood questions put to him and his statements were coherent. (R. 20–22; see also R. 24–27.) When Lieutenant Flaherty came into the room, the inspector asked petitioner to repeat his account of the shooting to the lieutenant, and petitioner did so (R. 28). Flaherty testified that petitioner had obviously been drinking, but that he could not say that petitioner was drunk. Petitioner spoke of the time he had met Flaherty in 1939 and appeared to remember the incident clearly. Petitioner's answers were responsive to the questions put to him by the lieutenant and the inspector. (R. 22–23; see also R. 27–31.)

About 4:15 p. m. the same day—October 26, 1943—petitioner was taken before a United States Commissioner on the basis of a complaint made by one of the arresting sergeants. The Commis-

[2] The officers' account of petitioner's statements was developed before the jury after the judge had ruled that their testimony in this regard was admissible.

sioner did not permit petitioner to enter a plea for himself, but entered a plea of not guilty for him and committed him to the custody of the United States Marshal. The matter was then continued to November 2, but prior to that time an indictment had been returned against petitioner, with the result that no further hearing was held. The Commissioner testified that he entered the not guilty plea for petitioner because no witnesses were present and also because petitioner was "so emotionally disturbed" that the Commissioner thought he ought not to have been arraigned. (R. 23–24; see also R. 38–39.)[3]

[3] At the preliminary inquiry out of the presence of the jury, the Commissioner testified as follows concerning petitioner's condition (R. 23):

"* * * the defendant was so emotionally disturbed that he ought not to have been arraigned. Defendant was apparently in a condition where he had very little understanding of the gravity of the charge which had been placed against him. Defendant was not in any position to be arraigned at that time. Defendant seemed to have no understanding whatever of the predicament he was in. Defendant answered to his name, he made something of a scene, which I would call a scene, not too terrible a scene, and acted certainly abnormally, to say the least. Defendant was talking, his conversation was absolutely unintelligible. Witness could not remember what defendant said. Defendant was talking in a loud voice and also mumbling to himself. Witness could understand some of it but could not remember it. Defendant answered his name, said, 'This is getting serious,' then started to go all to pieces; he was pretty nervous.* * *"

When called as a defense witness before the jury, the Commissioner testified (R. 38–39):

"* * * The complaint was read to defendant, he answered to his name, and witness entered a plea of not guilty

On October 28, 1943, two days after petitioner's arrest, Inspector Barrett and Lieutenant Flaherty again talked with him at the District Jail.[4] Petitioner was completely sober at that time.

The inspector told petitioner that there were a few things he "wanted to straighten out" (R. 25). Petitioner corrected his prior statement to these officers as to the place of the shooting, and said that it occurred at 5th and A rather than 4th and A Streets, N. E. (R. 25, 29). It was at this time that petitioner told the officers that, although he did not usually carry a gun, he had taken one with him on the night he met Mrs. Robinson (R. 25). When the officers asked him to explain why he

---

because defendant did not seem to be in a condition where he could rightfully understand the predicament or seriousness of the offense with which he was charged; witness only remembers defendant saying: 'This thing is getting serious'; that witness did not smell any liquor on defendant, he was not close to him. Defendant did not stagger. Defendant's tone of voice was very high; witness could understand what defendant said sometimes and at other times he could not. Defendant was sort of mumbling. It was very hard for witness to determine just exactly the defendant's condition. Defendant's condition was such that witness ought not to have permitted defendant to enter a plea in any type of case. On cross-examination, witness testified that at the arraignment, defendant responded to his name and that he was the man charged. * * *" (See also the testimony of a deputy marshal, the deputy coroner, and the chief clerk of the District Jail, each of whom was called as a defense witness, concerning petitioner's condition later in the afternoon of October 26, R. 37, 39–40, 41.)

[4] The facts as to this second interview were not developed at the preliminary hearing, but were brought out when the trial was resumed before the jury.

had shot Mrs. Robinson, petitioner said "he didn't want to discuss it any further, that he had told them all about it at No. 10," that he had "gone over the whole thing at No. 10 and there was nothing additional to add" (R. 30).

In his charge to the jury the trial judge instructed them in respect of petitioner's statements to the police (R. 75):

> It is argued in behalf of the defendant that when those statements were made he was still in a drunken condition and that by reason thereof those statements were mere vapid ramblings of a drunken man, they did not represent truth and fact. He was not relating what occurred, that is his position.
>
> On the other hand, the Government contends that although he was drinking he nevertheless did remember what had occurred, stated the substantial truth to the officers on the several occasions mentioned, and that his statements did in their essence represent the truth of this unfortunate affair. But that is a question for you to decide. It is for you to determine whether or not he was in a state of drunkenness and, if so, whether or not it was so pronounced that he did not remember and that what he said did not represent fact and truth. If you believe that to be so, then of course you will give no credence to his statement, it would have no weight (his statements would have no weight); but on the other hand, if you believe that his statements

were the product of memory and truth, then of course you would give them weight, you would accept them, you would fit them into the whole pattern of fact, of evidence I should say, and in the light of the whole picture give those statements such weight as you believe them entitled to.

ARGUMENT

Petitioner contends (Pet. 15–16, Br. 18–34) that the trial judge committed reversible error in permitting Inspector Barrett and Lieutenant Flaherty to testify as to the inculpatory statements made by petitioner to them after his arrest. He does not argue that the fact that his inculpatory statements were made while he was under the influence of alcohol necessarily rendered them untrustworthy as evidence. Indeed, it is well established that the mere fact of intoxication does not render a confession inadmissible, but is, rather, a factor to be considered by the jury in determining its weight and credibility. *Bell* v. *United States,* 47 F. 2d 438 (App. D. C.); see cases collected at 74 A. L. R. 1102, 50 L. R. A. (N. S.) 1077, 18 L. R. A. (N. S.) 789. In the instant case, the evidence fairly establishes that petitioner, although under the influence of alcohol, was in sufficient possession of his faculties to be able to give a trustworthy account of his actions. He himself testified that during the morning of the day of the confession, he called Inspector Barrett to give him "some information," and left

his telephone number with the person who answered at the police department (R. 48, 52). Petitioner talked rationally with the arresting officers and was cunning enough to tell them that his gun was in his car, although he had it in his pocket at the time. He was able to give a coherent account of the shooting to Inspector Barrett and Lieutenant Flaherty, and his answers to their questions were responsive. His account of the shooting harmonized with the facts established by independent evidence (cf. R. 24–25 with R. 11–13, 15, 32, 38). Two days later, when he was admittedly sober, he apparently recollected the statements he had made to these officers, for he said on that occasion that he had told them "all about" the "whole thing" in his prior statements made at No. 10 precinct (R. 30).

The trial judge correctly and clearly charged the jury that it was to determine whether the petitioner's statements were the "mere vapid ramblings of a drunken man" or whether they did "represent the truth of this unfortunate affair" (R. 75). Under the circumstances, as the court below held (R. 82), the statements were properly presented to the jury under appropriate instructions.

Petitioner's principal argument is that his statements should have been excluded under the doctrine of *McNabb* v. *United States,* 318 U. S. 332. We think that there was no unlawful conduct on the part of the metropolitan police officers

which would justify the exclusion of petitioner's statements on such ground. There was here no violation of the rule of the *McNabb* case excluding confessions secured during a period of "inexcusable detention for the purpose of illegally extracting evidence from an accused," and no "successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure." See *United States* v. *Mitchell,* 322 U. S. 65, 67.

Petitioner was brought before a committing magistrate a little more than two hours after he was arrested. During that period he was questioned for less than twenty minutes, and he answered the officers' questions voluntarily without fear of threats or inducement of reward. Petitioner attempts to spell out a violation of the *McNabb* rule in the fact that he was taken to No. 10 precinct for questioning, without the opportunity to consult counsel, instead of being immediately arraigned (Br. 19–20). But his argument in this respect is specious. Here, as in the *Mitchell* case, there was a "prompt acknowledgement by an accused of his guilt", and the confession was "not elicited through illegality" (322 U. S. at 70). The absence of counsel is no more relevant here than it was in the *Mitchell* case.

Neither, we submit, does petitioner's voluntarily induced intoxication render illegal conduct by police officers which otherwise bears no taint

of illegality. As we have shown, *supra,* pp. 11–12, it is evident that petitioner was well able to understand what he was saying, and it is clear that the officers took no advantage of his condition to extort admissions from him.[5]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

APRIL 1945.

[5] Since petitioner's statements at the first interview were properly admitted in evidence, there can, of course, be no question as to the admissibility of his statements made in the second interview at the District Jail, after he had been brought before a committing magistrate and at a time when he was admittedly sober. Moreover, irrespective of the validity of the first statement, we believe that the second was admissible under the principle of *Lyons* v. *Oklahoma,* 322 U. S. 596.

U. S. GOVERNMENT PRINTING OFFICE: 1945